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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/837,094	04/18/2001	James M. Sheppard JR.	3129	8428

7590 11/07/2006

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EXAMINER

BEFUMO, JENNA LEIGH

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 11/07/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

✓

Communication Re: Appeal	Application No.	Applicant(s)	
	09/837,094	SHEPPARD, JAMES M.	
	Examiner	Art Unit	
	Jenna Befumo	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

1. ☐ The Notice of Appeal filed on _____ is not acceptable because:
- (a) ☐ it was not timely filed.
 - (b) ☐ the statutory fee for filing the appeal was not submitted. See 37 CFR 41.20(b)(1).
 - (c) ☐ the appeal fee received on _____ was not timely filed.
 - (d) ☐ the submitted fee of \$_____ is insufficient. The appeal fee required by 37 CFR 41.20(b)(1) is \$_____.
 - (e) ☐ the appeal is not in compliance with 37 CFR 41.31(a)(1) in that no claim has been twice rejected.
 - (f) ☐ a Notice of Allowability, PTO-37, was mailed by the Office on _____.
2. ☐ The appeal brief filed on _____ is NOT acceptable for the reason(s) indicated below:
- (a) ☐ the brief and/or brief fee is untimely. See 37 CFR 41.37(a).
 - (b) ☐ the statutory fee for filing the brief has not been submitted. See 37 CFR 41.20(b)(2).
 - (c) ☐ the submitted brief fee of \$_____ is insufficient. The brief fee required by 37 CFR 41.20(b)(2) is \$_____.
- The appeal in this application will be dismissed unless corrective action is taken to timely submit the brief and requisite fee. See 37 CFR 41.37(a)(1). Extensions of time may be obtained under 37 CFR 1.136(a). See 37 CFR 41.37(e).**
3. ☒ The appeal in this application is DISMISSED because:
- (a) ☐ the statutory fee for filing the brief as required under 37 CFR 41.20(b)(2) was not timely submitted and the period for obtaining an extension of time to file the brief under 37 CFR 1.136(a) has expired.
 - (b) ☐ the brief was not timely filed and the period for obtaining an extension of time to file the brief under 37 CFR 1.136(a) has expired.
 - (c) ☐ a Request for Continued Examination (RCE) under 37 CFR 1.114 was filed on _____.
 - (d) ☒ other: See Attachment Sheet.
4. ☒ Because of the dismissal of the appeal, this application:
- (a) ☒ is abandoned because there are no allowed claims.
 - (b) ☐ is before the examiner for final disposition because it contains allowed claims. Prosecution on the merits remains CLOSED.
 - (c) ☐ is before the examiner for consideration.

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Attachment Sheet

1. On July 5, 2006, the Office mailed a letter indicating the Brief on Appeal filed May 15, 2006 was defective because the Summary of the Claimed Subject Matter was improper. Notice was given as to what features were considered improper.
2. On August 3, 2006, Appellant filed a new Brief on Appeal and explicitly declined to correct the informalities noted by the examiner. As such, the new Brief on Appeal remains non-compliant for the reasons set forth in the letter of July 5, 2006. The specific issues regarded as rendering the Summary of the Claimed Invention improper were and are:
 - a. The Summary is not directed to the claimed invention, but rather, features not represented in the claims. That is, it represents a summary of the disclosure, not the claims.
 - b. More importantly, the Summary does not identify which independent claim is being summarized, if any, nor identify where the features and elements of the claims are to be found in the specification. Additionally, the table provided by Appellant is not found in the Summary and cannot be considered part of the Summary.
3. According to MPEP 1205.03, failure to provide a compliant Brief in response to a Notice has only one recourse. Please note:

1205.03 [R-3] Non-Compliant Appeal Brief and Amended Brief

The question of whether a brief complies with the rule is a matter within the jurisdiction of the examiner **>and the Board. The examiner will review the brief to ensure that the required items of the brief are present. Both the Board and the examiner will review the brief for compliance with the content requirements of the brief (37 CFR 41.37(c)). 37 CFR 41.37(d)< provides that if a brief is filed which does not comply with all the requirements of paragraph (c), the appellant will be notified of the reasons for noncompliance. Appellant will be given ** 1 month or 30 days from the mailing of the notification of non-compliance, whichever is longer **>to file an amended brief.< Extensions of time may be granted under 37 CFR 1.136(a) or 1.136(b). The *>Office< may use the form paragraphs set forth below or form PTOL-462, "Notification of **>Non-Compliant Appeal Brief (37 CFR 41.37)<" to notify appellant that the appeal brief is defective. **The appeal will be dismissed if the appellant does not timely file an amended brief, or files an amended brief which does not overcome all the reasons for noncompliance of which the appellant was notified.** (*Emphasis in bold added.*)

Additionally it is noted the MPEP provides:

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Attachment Sheet

In response to the Notice of Non-Compliant Appeal Brief (37 CFR 41.37) or the Office communication that requires an amended brief, appellant is required to file an amended brief that is either a complete new brief with the required corrections or a replacement section(s) as noted below:

....

(B) When the Office holds the brief to be defective solely due to appellant's failure to provide a summary of the claimed subject matter as required by 37 CFR 41.37(c)(1)(v), an entire new brief need not, and should not, be filed. Rather, a paper providing a summary of the claimed subject matter as required by 37 CFR 41.37(c)(1)(v) will suffice. Failure to timely respond to the Office's requirement will result in dismissal of the appeal. See MPEP § 1215.04 and § 711.02(b).

4. If Appellant disagrees with a holding of noncompliance, a petition would have been accepted under either 37 CFR 1.181 or 41.3 and considered even though such would not toll the time period of the Notice of Noncompliance.



Terrel Morris
Supervisory Patent Examiner
Group Art Unit 1771